The act complained of must of course be connected with the particular act which the servant was authorised to do. The Crown would not be liable if the P. C. had arrested some third party quite unconnected with his particular duty or if he had shot the Chetty instead of bringing him to the police station, but in this case I have no hesitation in finding that the P. C.'s act in arresting the Chetty was immediately connected with the duty which he was authorised to carry out. I also find that in arresting the Chetty the P. C. conceived that he was acting in his employer's interest. The Crown therefore must be held liable for the P. C.'s act.

As regards damages, the plaintiff adduced evidence that his loans from other Chetties had been called in and that he could not renew them until a meeting of elders in India had discussed and decided on the question of his arrest. It was sought to prove that the plaintiff had suffered a direct pecuniary loss which could be estimated in dollars. The Solicitor-General submitted that this was evidence of special damage and had not been pleaded. I think this submission is sound and that the evidence should be disregarded though it might have saved time if the evidence had been objected to when it was called.

I am, however, entitled to give general damages and considering the fact that the plaintiff is carrying on business in Malacca and was led in handcuffs through the streets of the town in broad day light, I have no doubt that his reputation must have been injured. I assess the damages at $1,000. The respondents must pay the petitioner's costs. Costs to be taxed on higher scale.

Judgment accordingly.

Solicitors for the Petitioner—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION.]

REX ..... **Respondent**

vs.

ONG SUAN.....**Appellant.**

[MALACCA CRIMINAL APPEAL No. 4 OF 1932.]

Ordinance No. 158 (Tobacco Duties) Sections 9, 21, 52.—Offence—Confiscation of car—Criminal Procedure Code, Section 428.

Section 9 (1) of Ordinance No. 158 (Tobacco Duties) is prohibitory and the onus is on a person charged under that subsection to prove that he has complied with the regulations and restrictions.

It is illegal to import tobacco into Malacca by road as no place has been appointed as an examining station for tobacco so imported.

A magistrate has no option but to order the forfeiture of a motor car by which it is proved that tobacco has been illegally imported.

The appellant was charged before W. G. Reeves, Esq., Police Magistrate Malacca as follows:—

1. That he on or about the 8th day of August 1932 at about 7 p.m. at Kubu, Malacca, did sell dutiable tobacco stored elsewhere than in a bonded warehouse, contrary to Section 21(2) Ordinance 158.
2. That he, on or about the 8th day of August, 1932, did import dutiable tobacco not in accordance with such regulations and restrictions as prescribed, contrary to Section 9(1) of Ordinance 158 as amended by Ordinance 33 of 1926.

The accused claimed trial but after some evidence had been given by the prosecution the accused pleaded guilty to the two charges but elected to give and was permitted to give evidence on oath to prove that he acted in ignorance of the law. In the course of his evidence he said "I brought the tobacco in my own car M 386."

The amount of duty payable on the tobacco which had been imported into Malacca by road from Johore was $426.30.

The accused was convicted and was fined $300 or 3 months' Rigorous Imprisonment on each charge, the terms of imprisonment to be consecutive if the fines were not paid.

The accused appealed against sentence.

On the hearing of the appeal Counsel for the appellant applied for leave to add as a further ground of appeal (of which he had given previous notice to the Deputy Public Prosecutor) that the second charge stated no offence in point of law.

Munro for appellant. Section 9(1) speaks of regulations which mean rules made under the Ordinance and not the Ordinance itself. Ordinance No. 131 (Interpretation) Section 2 (d) "Restriction is cognate to regulation." Maxwell on Interpretation 6th Ed. p. 574. No regulations have been made by the Governor in Council on the matter and therefore none have been contravened.

Mc Elwaine D.P.P. for the Crown. Ordinance 131 only defines when context does not imply a different meaning. The section itself prescribes the regulations and restrictions. Contravention of Section 9 is punishable under Section 49. Section 9 forbids importation of tobacco into Malacca except in prescribed ways. As no place has been appointed under subsection (4) importation by road is absolutely forbidden. Accused must satisfy the Court that he imported legally.

Munro in reply

Cur. Ad. Vult.

TERRELL, J. The accused was convicted of selling dutiable tobacco in contravention of Section 21(2) of Ordinance No. 158 (Tobacco Duties) and of importing dutiable tobacco in contravention of Section 9(1) of the same Ordinance.

The accused pleaded guilty and was fined $300 on each charge.

The original appeal was merely against sentence, but at the bar Mr. Munro did not proceed with the appeal against sentence, and obtained leave to enlarge the time for appealing against the conviction on the second charge on the ground that the charge disclosed no offence in law.

Section 9(1) under which the accused was convicted reads as follows:—

"No person shall import or export dutiable tobacco except under and in accordance with such regulations and restrictions as are prescribed."

It was argued that the meaning of this provision is that anyone may import or export unless prohibited by such restrictions and regulations as may be prescribed and that no regulations on the subject having been made, there can be no offence under Section 9(1). In this connection it was argued that owing to the juxtaposition of 'regulations and restrictions' the meaning must be that such regulations and restrictions must be prescribed by rules made in pursuance of Section 59(d) of the Ordinance and that the restrictions indicated are not such as can be discovered in the Ordinance itself.

I do not think that this point is material.

Section 9(1) is prohibitory and not permissive in form and in intention. The law *prima facie* makes the importation of tobacco an offence, and it is for the accused to prove that he falls within the exception, just as under the Penal Code the onus is on the accused to prove that his case falls under one of the exceptions which will reduce the crime of murder to one of culpable homicide not amounting to murder. As admittedly no rules have been made in pursuance of Section 59(d) it is clearly impossible for the accused to establish his innocence.

Then it was said that the charge ought to have been framed under Section 9(4) which reads as follows:—

"No person shall import or export dutiable tobacco by land, except by parcel post or railway or into or from a place appointed by the Superintendent by notification in the gazette."

But it is not suggested that the accused imported the tobacco by parcel post or by railway and it is again admitted that no place has been appointed by the Superintendent by notification in the gazette. As I feel satisfied that if the accused had been charged under Section 9(4) he must have been convicted, there has clearly been no failure of justice and Section 428 of the Criminal Procedure Code applies.

The appeal, therefore, fails and must be dismissed and the sentence confirmed. The effect of this ruling is that no tobacco can be imported by road from Johore to Malacca without committing an offence as no examination station has ever been established at the frontier as contemplated by the Ordinance. So much was admitted by the Monopolies Officer who gave evidence for the prosecution. The practice appears to be that if a man imports tobacco in this way and voluntarily pays the duty in Malacca he will not be prosecuted. In other words the Monopolies Department covers up its failure to provide examination stations as contemplated by the legislature by omitting to prosecute for offences which become inevitable as the result of such failure.

There is one other aspect of this case which is deserving of comment. The evidence of the prosecution was that the tobacco had been imported from Johore in car No. M. 864 and that dregs of tobacco and gunny bags were found in the car and that the car had been seized. If that were not enough the accused himself stated on oath that he had imported the tobacco in this very car. Thereupon the learned magistrate was under a statutory duty to forfeit the car, Section 52(1) of Ordinance No. 158 (Tobacco Duties) reading as follows:—

"All tobacco in respect of which any offence under this Ordinance has been or is being committed, together with any receptacle, package, cart, carriage or conveyance in which the same is found, may be seized by any revenue officer, and any tobacco, receptacle, package, cart, carriage, or conveyance so seized shall be forfeited."

The learned magistrate however, did nothing of this sort. His notes read "No order for forfeiture of car—no evidence that tobacco was found in it—produced by remnants."

Quite apart from the fact that the evidence was all the other way, the learned magistrate did not appear to realise that he had no discretion in the matter. As soon as the evidence proved that the car had been seized forfeiture should have followed automatically. It should be observed that it is entirely outside the province of judges or magistrates to mitigate the harshness of a law by arrogating to themselves a discretion of which the legislature has thought fit to deprive them.

Appeal dismissed.
Sentence confirmed.

Solicitors for the Appellant—*Allen & Gledhill.*

F. M. S.

[APPELLATE CIVIL JURISDICTION]

V. R. K. R. S. CHETTIAPPAH CHETTY **Appellant**

vs.

RAJA ABDUL RASHID IBNI ALMERHUM SULTAN IDRIS .. .. .. Respondent

[PERAK CIVIL APPEAL No. 9 of 1932]

Perak Order in Council, 1888—Meaning of the words 'sued for a debt'—Land Code, 1926, Section 149.

A chargee, in taking proceedings under Section 149 of the Land Code, does not 'sue for a debt,' and the provisions of Perak Order in Council, 1888, have no application whatsoever to such proceedings.

Decision of Gerahty, J., reversed.